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### What is Buddhist Law?

Rebecca Redwood French

*University at Buffalo School of Law*

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# What is Buddhist Law? Opening Ideas

REBECCA REDWOOD FRENCH†

## INTRODUCTION

*At the time the enlightened one, the Lord, was staying at Verañjā near Naḷeru's Nimba tree with a great company of five hundred monks. A Noble one of Verañjā heard:*

*Sir, the recluse Gotama, son of the Sakyans, having gone forth from the Sakyan clan,<sup>1</sup> is staying at Verañjā near Naḷeru's Nimba tree with a great company of five hundred monks. The highest praise has gone forth concerning the lord Gotama: he is indeed Lord, perfected*

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† Roger and Karen Jones Faculty Research Scholar, Professor of Law, SUNY Buffao School of Law. I would like to thank Anya Bernstein, David Engel, Samantha Barbas, Jack Schlegel, and Guyora Binder for their encouragement and comments. Thanks also go to Linda Kelly and Jessica Reigelman, who provided essential help with the drafts, and Marcia Zubrow with research. Much of the work cited herein and many of the ideas come from a recent work by Rebecca Redwood French and Mark Nathan entitled *Buddhism and Law: An Introduction* (Cambridge, Cambridge University Press 2014). I would like to thank all of the readers and authors of the essays in that book for their contributions to this subject matter. I have borrowed extensively from that text. I would like to dedicate this Article to the late Andrew Huxley, a pillar of the original inquiry into Buddhism and Law. Exceptional person, good friend, you will be sorely missed.

The languages cited have been limited primarily to Pāli and Sanskrit, the two original ecclesiastical languages of South Asia. Most scholars think that the Buddha spoke in Māgadhī, the language of the Magadha state in the central Ganges River valley, as well as several other dialects of northern India. The head of the Magadha state, King Bimbisāra, and his son were both patrons of the Buddha. After the Buddha's death, his teachings were translated into Pāli, Sanskrit, Tibetan, and many other languages; P, S, or T are used in the text to indicate the language used. Every effort has been made to use English translations in the text with the Pāli, Sanskrit, or Tibetan words provided in the footnotes.

1. The historical Buddha was a member of a tribe called the Śākya, a family or clan within that tribe called Gotama or Gautama, with the personal name of Siddhārtha. Their term Śākyamuni means "sage of the Śākya tribe," while the term Buddha means "the awakened or enlightened one." All of these, as well as many other names, are used to refer to him.

*one, fully enlightened, endowed with knowledge and conduct, well-farer, knower of the worlds, unrivalled trainer of men to be tamed, teacher of gods and mankind, the enlightened one, the Lord. Having brought to fulfillment his own powers of realisation, he makes known this world, together with gods including the Evil tempters, and the Noble ones; creatures, together with recluses and Noble ones, together with gods and men. . . . He explains with the spirit and the letter the Noble-life completely fulfilled and wholly pure. It is good to see a perfected man like that.*

—*The Beginning of the Vinaya, The First Paragraph of the Buddhist Law Code introducing the Buddha.*<sup>2</sup>

Why should we know about Buddhist Law? There are literally hundreds of thousands of books on Christianity and its relationship to the rules of the Bible, Canonical law and Christian legal systems, on Jewish law, the Torah, the Talmud and the history of Judaism, on Shari'a and the role of Islamic law in different Middle Eastern countries, on Hindu law and its relationship to the politics of India, but writing on Buddhist Law and the effects of Buddhism on legal systems is only just now beginning to be explored.<sup>3</sup> While the legal traditions of all major religious traditions have been extensively studied and written about—indeed they have their own academic departments, universities, conferences, book series, hundreds of scholars and lay persons who work and write on them—there are very few scholars of, and little written on, the legal concepts in the Buddhist tradition. This is particularly a conundrum, given the current emphasis in both the general media and the

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2. Adapted from 1 THE BOOK OF THE DISCIPLINE 1-2 (I.B. Horner trans., 1938). Horner's translation of the *Vinaya* or Buddhist Law Code in six volumes will be the one employed in this Article. There are a few stock words and phrases that have been changed: Sir is substituted for "Verily, good sir," and the term Noble or Noble one is substituted for the terms Brahmas, Brahmins and Brahma-life. The Buddha used the term Brahma in a very specific way and it can be confusing to first time readers. The word deva(s) has been replaced with the word god(s). Mara has been replaced with the term Evil tempter.

3. While many scholars, in both the United States and Europe, have worked on the Buddhist Law Code from a Buddhist vantage point, very few have worked on it from a legal vantage point, the purpose of this Article. Frank Reynolds, emeritus from the Chicago Divinity School, put together several scholars in a conference in 1994 that was published as *Buddhism and Law*, 18 J. INT'L. ASS'N OF BUDDHIST STUDIES 1-143 (1995). The late Andrew Huxley, to whom this Article is dedicated, was also a very important figure in promoting the legal point of view.

academic literature on religion, religious laws, and their applications—be it the invocation of Shari’a law in Iraq, arguments about the Torah’s role in Israel, or the influence of the dharmaśāstras on the fundamentalist Bharatiya Janata Party in India. Four initial points demonstrating why we should know about Buddhist Law will be presented in this introduction.

First, we should know about Buddhist Law because Buddhism has a detailed law code and a very long legal history. According to Buddhist tradition, the historic Sakyamuni Buddha, in his close to fifty years of teaching, expounded regularly on the correct legal rules for his followers, all of which were then collected into a body of work called the *Vinaya*, the first of the three “baskets” of the Buddhist canon.<sup>4</sup> In fact, this may be the only religion in which the founder is thought to have made regular, detailed decisions on legal matters in a narrative casuistic format covering hundreds of topics over a period of approximately five decades. While the Buddhist community may have altered and adjusted the rules before they were first redacted around the first century BCE, there is little doubt that the Buddha, the central religious leader and *not* his community of followers, is considered the sole source of these rules, the architect of Buddhist Law.

Second, Buddhist Law is uniquely focused on the socialization and internalization of the individual to a set of rules that will help him or her operate within a community.<sup>5</sup> This is a very different idea of law and one that has all but disappeared in the twentieth century. Our current definition of law, which will be discussed in the first Part of this Article, focuses on cases, rules, rights, judicial procedures, decisions, and sanctions, and not on how we want an individual to act or a society to operate so that everyone can get along. The Buddha was particularly concerned with the idea that good deportment, conduct, and behavior by an individual on a daily basis radically reduced conflict and the need for legal

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4. Rebecca Redwood French & Mark A. Nathan, *Introducing Buddhism and Law*, in *BUDDHISM AND LAW: AN INTRODUCTION* 1, 8-9 (Rebecca R. French & Mark A. Nathan eds., 2014).

5. See *infra* Part I.B (discussing the purpose and target audience of Buddhist Law).

rules, and increased the possibility of that person being able to pursue goals, in this case, meditation and enlightenment. Our definition and understanding of law will have to expand to include the range of processes and ideas included here.

Third, knowledge of Buddhist Law and Buddhism is central to our local as well as our international concerns in the current political environment; we are currently engaged in commerce with, worried about, carefully watching the fighting inside, trying to reengage diplomatic negotiations with, and propping up, states that either are currently Buddhist or were Buddhist for much of their history. Several states that have or had Buddhism as a major religion are currently of major interest to the United States, such as India, Sri Lanka, Myanmar, Thailand, Laos, Cambodia, Vietnam, Taiwan, China, Korea, and Japan. As Peter Harvey and others have noted, one fifth of the current world population either is or has been influenced extensively by Buddhism<sup>6</sup> and the vast majority, 99% of all Buddhists, live in Asia, the current center of global commercial production.<sup>7</sup> The Chinese government has stated that non-cult Buddhism (Tibetan Buddhism is cult-Buddhism, the Falun Gong is considered syncretic cult-Taoism-Buddhism) is the best and most attractive alternative to the atheism of the Communist Party.<sup>8</sup> Thailand is 95% Buddhist, Cambodia is 90%, Myanmar is 88%, and Bhutan, Sri Lanka, Tibet, Laos, Vietnam, and Japan are over 50% Buddhist.<sup>9</sup> Large populations of Buddhist also exist in Macau, Taiwan, China, South Korea, and India.<sup>10</sup> In fact, over half of all the Buddhists in the world currently live in China, and, as the

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6. See PETER HARVEY, AN INTRODUCTION TO BUDDHISM 376-418 (2d ed. 2012).

7. The Pew Forum on Religion & Pub. Life, *The Global Religious Landscape*, PEW RESEARCH CTR. 31 (Dec. 2012), [www.pewforum.org/files/2014/01/global-religion-full.pdf](http://www.pewforum.org/files/2014/01/global-religion-full.pdf).

8. See *Religion in China*, COUNSEL ON FOREIGN RELIGIONS (May 16, 2008), <http://www.cfr.org/china/religion-china/p16272>.

9. There are many versions of these statistics that are all fairly similar. *E.g.*, *Largest Buddhist Populations: Top 10 Countries with Highest Proportion of Buddhists*, BUDDHA DHARMA EDUC. ASS'N & BUDDHANET, [www.buddhanet.net/e-learning/history/bstatt10.htm](http://www.buddhanet.net/e-learning/history/bstatt10.htm) (last visited Apr. 17, 2015).

10. *Id.*

fourth largest religion in the world with approximately 488 million practitioners worldwide, the religion is growing throughout the Asian Pacific as well as the world.<sup>11</sup>

Fourth, it is time to begin to look at Buddhist Law because, although scholars in Buddhist Studies, Asian Area Studies, and other disciplines have been writing on Buddhist cultures for a long time, they have primarily concentrated on translating and interpreting the enormous body of philosophical and religious texts more than legal and political writings. As one well-known Buddhologist, the late Ian Harris, has stated of the law and politics of Asia: “[D]espite high-level interest in the political manifestations of the great monotheist traditions of Christianity, Islam, and Judaism, little sustained attention has been given to this crucial aspect of Buddhism, Asia’s most important religion.”<sup>12</sup>

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11. The Pew Research Project on Religion and Public Life presents the following figures:

There are about 488 million Buddhists worldwide, representing 7% of the world’s total population as of 2010. The three major branches of Buddhism in the modern world are Mahayana Buddhism, Theravāda Buddhism and Vajrayana (sometimes described as Tibetan) Buddhism. While affiliation with particular branches of Buddhism is not measured in most censuses and surveys, Mahayana Buddhism is widely believed to be the largest, because it is prevalent in several countries with very large Buddhist populations, particularly China, Japan, South Korea and Vietnam. Theravāda Buddhism, the second-largest branch, is concentrated in such countries as Thailand, Burma (Myanmar), Sri Lanka, Laos and Cambodia. Vajrayana Buddhism, the smallest of the three major branches, is concentrated in Tibet, Nepal, Bhutan and Mongolia. The Buddhist population figures in this study also include members of other groups that identify as Buddhist, such as Soka Gakkai and Hoa Hao.

The Pew Forum on Religion & Pub. Life, *The Global Religious Landscape*, PEW RES. CTR. 31-32 (Dec. 2012), [www.pewforum.org/files/2014/01/global-religion-full.pdf](http://www.pewforum.org/files/2014/01/global-religion-full.pdf). Several commentators have noticed that Buddhism has a very high growth rate outside of Asia. For example, the Australian Bureau of Statistics found Buddhism to be the fastest-growing spiritual tradition in Australia in terms of percentage gain, with a growth of 79.1% for the period 1996–2001 (200,000 to 358,000). See Australian Bureau of Statistics, *Religion*, YEARBOOK AUSTRALIA (2003), <http://www.abs.gov.au/ausstats/abs@.nsf/bb8db737e2af84b8ca2571780015701e/bfddalca506d6cfaca2570de0014496e!OpenDocument>.

12. Ian Harris, *Introduction – Buddhism, Power and Politics in Theravada Buddhist Lands*, in *BUDDHISM, POWER AND POLITICAL ORDER* 1, 1 (Ian Harris ed., 2007).

For Harris, this is a real oversight. Buddhism was the central factor in the formation of many states in Southeast, Central, and Northern Asia.<sup>13</sup> As such, it has a deep-rooted influence on their political development that is crucial to an understanding of the political and legal operations of these states. While recognizing the immense complexities of language, history, culture, and tradition, it is imperative to address the lack of information in this area.

This Article and the ones that follow in this series will attempt to rectify this situation by providing a glimpse at some of the history of Buddhist Law, the context of its origin, how it is interpreted and used, the original text, the *Vinaya*, as well as the unique legal systems of several states in which Buddhism has and is flourishing. Each of these Parts will be interspersed with translations from the actual *Theravādan Pāli* text of the *Vinaya*, the Buddhist Law Code, set off and rendered in italics. Part One details four of the basic questions that need answering at the very beginning of such an enterprise: Where did Buddhist Law come from, and who was Buddhist Law for? Can we think of all of this as “dharma,” and where does this leave our usual definition of “Law”?

Part Two delves into the *Vinaya*, the Buddhist Law Code, in a bit more depth. In this Part, the questions are: how many *Vinayas* are there; what kinds are there; and what are their dates? Why were they announced to begin with? And how are the *Vinayas* organized, and what is their style? Part Three presents a small taste of all the different kinds of Buddhist-influenced legal rules that have evolved throughout Asia as well as the legal material present in the rest of the Buddhist canon besides the *Vinaya*. Later Articles will go into several of the above issues in much greater depth.

Part Three addresses the many instances of legal discussions and proscriptions outside the basic Law Code in both other parts of the canon and in other texts. The *Vinaya*, and related texts, affected and influenced directly many secular legal texts, was commingled with a variety of other documents in some areas, and was subject to secular restrictions and strict boundary enforcement in several

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13. See generally *id.*

others. And not surprisingly, the general patterns of types of Buddhist Law follows the types of Buddhism in three different geographic areas: South and Southeast Asia; East Asia; and North Asia and the Himalayan region.

This Article and the ones that follow are meant to be descriptive and explanatory rather than critical and argumentative. They are designed to provide a deeper understanding of the basic concepts and ideas in Buddhist Law as well as the reasons that we might falter a bit in trying to understand them. The ultimate goal however, is to create a picture of the variety of Buddhist social and collective organizations and the rules that underlie them. At its deepest formulation, Buddhist Law and politics represent a completely different and very subversive model of government, not just a path to enlightenment. This is a model of spiritual and religious guidance, a form of social and collective government that is at odds with our notions of the sovereign state, with the separation of church and state, and with ideas about the socialization needed to create a good society. This is a set of rules for spiritual guidance that is loaded with concrete legal norms. At their most clamorous, these are very radical claims indeed and constitute a profound attack on current orthodoxy in law, religion, and law and religion scholarship. I hope they enkindle both delight and a spirited debate.

## I. PART ONE

*Now at that time, a great company of monks, dwellers at Vesāli and sons of Vajjins, ate as much as they liked, drank as much as they liked and bathed as much as they liked. Having eaten, drunk and bathed as much as they liked, not having paid attention to the training, but not having disavowed it, they indulged in sexual intercourse not having declared their weakness. In the course of time, they became affected by misfortune to their relatives, by misfortune to their wealth, by the misfortune of disease, and so approaching the venerable Ānanda, spoke to him:*

*"Honored Ānanda, we are not abusers of the enlightened one, we are not abusers of dhamma, we are not abusers of the Order. Honored Ānanda, we are self-abusers, not abusers of others. Indeed we are unlucky, we are of little merit, for we, having gone forth well-taught under this dhamma and discipline, are not able for our lifetime to lead the Noble-life, complete and wholly purified. Even now, honored Ānanda, if*



*we might receive the novice ordination, in the presence of the Lord, if we might receive the full ordination, we would dwell continuously intent upon states which are good and belonging to enlightenment. Please, honored Ānanda, explain this matter to the Lord."*

*"Very well," he said. And the venerable Ānanda having answered the dwellers in Vesāli, the sons of the Vajjins, went up to the lord Buddha. And, having come up to him, he told this matter to the lord.*

*[And the Lord Buddha responded:] "It is impossible, Ānanda, it cannot come to pass that the Buddha should abolish the teaching on defeat which has been made known for the disciples, because of the deeds of the Vajjin or the sons of the Vajjin."*

*Then the Lord for this reason, in this connection, having given a talk on dhamma, addressed the monks thus:*

*"Monks, whatever monk should come, without having disavowed the training, without declaring his weakness, and indulge in sexual intercourse, he should not receive the full ordination. But, monks, if one comes, disavowing the training and declaring his weakness, yet indulging in sexual intercourse, he should receive the full ordination. And thus, monks, this course of training should be set forth:*

*Whatever monk, possessed of training and mode of life for monks, but not disavowing the training and not declaring his weakness, should indulge in sexual intercourse, even with an animal, is defeated, he is not in communion."*

—*A Section from the Buddhist Law Code, Vinaya, on Refraining from Sexual Intercourse.*<sup>14</sup>

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14. Taken from 1 THE BOOK OF THE DISCIPLINE, *supra* note 2, at 40-42. Exegesis: The first four rules of the Vinaya result in the strongest form of sanction available to the Buddhist *saṅgha*, ostracism, also referred to as expulsion, defeat, exclusion, and not in communion. The first of these four rules is the prohibition of sexual intercourse which has been described by the translator as typical of the religious sects of the period and also "a notion based as much on common-sense, as on the conviction that restraint and self-taming were indispensable factors in the winning of the fruit of a monk's life." *Id.* at xx-xxi. In this passage, one of the forms of sexual intercourse is discussed. Ānanda was the personal attendant, and often considered the closest disciple, of the Buddha. Having engaged in misconduct, these disciples plead that they have only injured themselves and not the dharma (P: dhamma) in their violations. They are requesting full ordination into monk status despite their transgressions. *Id.*

This Part deals with some of the preliminary issues that have to be cleared away to begin a discussion of the nature and content of Buddhist Law. This includes questions of its derivation and context, who it was actually composed for, what it was meant to be, when the actual law code was closed and redacted, how it relates to the term “dharma” which is often taken to mean law, the difference between Buddhist Law and Buddhism and Law, and how law will be defined for the purposes of these Articles.

A. *Where did Buddhist Law Come From?*

In the fifth century before Christ in the Ganges river plain of what is now India, filled as it was then with forests, jungles, local villages, and some larger towns, it was common to renounce your connection to society and go into the local forest for the purpose of meditating. The Brahman religion that was common in northern South Asia at the time had a category for this type of retreat, a *sannyasin*. Life was organized into different stages including student, householder, forest dweller, and *sannyasin* (P: *saṃnyāsa*), much like the pronounced stages in the modern world of infancy, early schooling, high school, marriage, work, and retirement. For many older males and females, their children took over the animals and farm so that the last stage of their life could be in the forest, living a simple life devoted to spiritual practice. If her husband died, a wife could move to the woods nearby, still seeing her family regularly, but devoting her days to prayer and ritual. This pulling away from regular life to concentrate entirely on a personal spiritual path was normal within the Indian social system.

It was during such a meditating session that a young individual called Gautama (P: Gotama) was enlightened and then decided to teach what he had learned. So the presence of forest dwelling teachers was very common and much accepted. Unlike others however, Gautama, the Sakyamuni Buddha became extraordinarily famous and taught what he had learned for close to fifty years. After several years, there were hundreds, perhaps even thousands of disciples,

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sometimes travelling in separate groups, following this *sannyasin*, known as the Buddha. A few homeless disciples travelling with a teacher could easily be managed, but problems arose among the Buddha's followers once they began to increase in numbers; it became imperative that a set of rules be developed. The result of this process was the *Vinaya*, the first section of the Buddhist canon, a listing of several hundred rules. They are traditionally attributed directly to the words and decisions of the Buddha and called *Buddhist Law* because they remain the rules enforced within the community of Buddhist disciples. It is generally accepted that they were reduced to writing sometime in the century before the Birth of Christ and have been maintained and indeed recited in reduced form twice a month<sup>15</sup> in most Buddhist communities since that time. At his death, the Buddha stated that he did not want an individual to be the head of this religion, that only his sayings and teachings should remain paramount. Throughout the Buddhist world, then, the central images of the Buddha are as a teacher and a lawgiver.<sup>16</sup>

B. *Who was Buddhist Law for?*

This particular origin story for the religion creates several problems for the non-Asian listener. These rules were for the *saṅgha* (P: *saṃgha*), a group of renouncers that had taken themselves out of society to facilitate meditation and the study of the spiritual doctrines with the Buddha. As part of this model, a synergistic relationship developed between the spiritual leader, the Buddha, the renouncing monks and nuns, and the local lay populations, as was common in ancient India. These legal rules were written for the renouncing nuns and monks as both a form of socialization

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15. This ceremony is called *uposadha* (P: *uposatha*).

16. There are many excellent sources for an historical perspective. A few more recent works are LARS FOGELIN, AN ARCHAEOLOGICAL HISTORY OF INDIAN BUDDHISM (2015); UPINDER SINGH, DISCOVERY OF ANCIENT INDIA: EARLY ARCHAEOLOGISTS AND THE BEGINNINGS OF ARACHAEOLOGY (2004); ROMILA THAPAR, EARLY INDIA: FROM THE ORIGINS TO AD 1300 (2002); R.A.E. Coningham, et al., *The Earliest Buddhist Shrine: Excavating the Birthplace of the Buddha, Lumbini (Nepal)*, 87 ANTIQUITY 1104, 1104-23 (2013); Kumkum Roy, *Society at the Time of the Buddha*, in BUDDHISM AND LAW: AN INTRODUCTION, *supra* note 4, at 31-45.

and a legal code of conduct. As a result, later scholars and followers have often stated that *Buddhist Laws* were just a series of rules followed by monks and nuns in sheltered environments without any general reference to the greater society. This is not the case. Although the Buddha is credited with creating the first monastic group, his followers and disciples were intimately part of the Indian religious and social landscape, not separate from it, and the rules they followed were very important to the lay population. Our image of Christian monasticism or spirituality in the West is not apposite to this early context.

Another issue is related to the fact that the Buddhist legal system of the *Vinaya* was redacted, and to a large extent closed to further changes, very early on, perhaps even before the Birth of Christ but definitely by the second century CE.<sup>17</sup> This is unlike the legal systems in most other religions. It does not mean that other *Vinayas* were not compiled with additions and replacements later on, but it does mean that the basic Pāli and Sanskrit versions of the original text remained as standards. Additionally, most scholars point out that the varieties of different *Vinayas* are, in fact, quite similar.<sup>18</sup>

This would be the equivalent of the legal prescriptions and sayings of Jesus Christ—not the writings of the disciples, not the Epistles to the Corinthians, or the decisions of the early church—being collected and made into rules within a few hundred years after his life and then frozen as the only legal code of Christians in the years that followed. This is not the Christian model. Instead, substantial parts of the law codes of the Christian churches are a much, much later development and involved the whole-scale incorporation of secular legal codes from European countries including systems of courts, lawyers, judges, rules, and sanctions. As a result, the standard model of religious law in the imagination of an American or European scholar is the law of the Holy

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17. See P. Kieffer-Pülz, *What the Vinayas Can Tell Us About Law*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 46-62.

18. The different *Vinayas* that we will deal with directly in this text are the *Theravāda-vinaya*, in Sri Lanka and Southeast Asia, the *Dharmagupta-vinaya*, commonly known as the *Four-Part Vinaya*, used throughout East Asia, and the *Mūlasarvāstivāda-vinaya* of Tibetan-speaking cultures. *Id.* at 46, 48.

Roman Empire, the Christian Roman law code, employed first by Otto I of Germany in 936 that lasted until the abdication of Francis II of Austria in 1806. When compared to this basic unified-state-system-with-an-Emperor template for religious law, the Buddhist Law Code, traditionally understood as created by the Buddha for his supporters, is not only *not* similar to canonical law, it may not even be thought of as *law* at all.<sup>19</sup>

When asking “who was Buddhist Law for,” another issue arises as to the nature of the laws themselves. Some readers will think that the laws of the Buddhist Law Code sound like rules of conduct rather than a law code. This is a central issue in our inquiry and it has been a problem for many scholars. Arguably, most of the early proscriptions by the leaders of a religious movement will involve discussions of how the group is going to comport itself in terms of the general society. The Buddha was certainly concerned with this issue. But the Buddha was also concerned with how a person who was seeking to become enlightened according to his principles and teachings should act to maximize the possible acceptance and understanding of these ideas. He wanted to create a person who was socialized into a disciplined and kindly way of acting with a very humble, restrained, and compassionate style of comportment.

The Buddha also wanted a person to be drawn without coercion or violence to both his teachings and to those who followed his teachings. The community of lay people who were learning from and supporting a group of monks or nuns was very concerned that the nuns and monks should follow exactly the requirements of the Buddha. In most lay communities, the ability of the layperson to gain spiritual merit and future advancement in their next life depended directly, not only on their own behavior, but on the proper behavior, comportment, and subsequent enlightenment of the monk or nun they were supporting. In other words, this was not a concern only for the individual nun or monk and their *saṅgha* community; it was a serious issue for the vast number of lay Buddhists who were to receive most of their religious merit through these religious actors. Throughout Buddhist history, when the conduct of the monks or nuns was

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19. See *infra* Part I.D.

thought to fall short, there were often purges, sweeping changes, and a cleansing of the Buddhist community.

### C. *The Problem with the Word "Dharma"*

The name given to all of Gautama's teachings, after that evening-long meditation resulting in his enlightenment and throughout the next forty-five years, is *dharma* (P: *dhmma*). This term was common in Indian languages at the time and had a broad range of meanings including, "the natural order of the universe and society as well as one's duty or ritual obligations within that order."<sup>20</sup> The early founders of Buddhist Studies in Europe, Eugène Burnouf and Brian Hodgson, decided to use the English term "law" to translate the term *dharma*, which means that the whole of the teachings of Gautama after his enlightenment—the nature of the universe, the position of human beings in it, reality, karma, nirvana, and all of the other basic ideas of Buddhist philosophy—are called "law."<sup>21</sup>

The English term *law* has some similar denotations as well as valences. We use *law* to describe the workings of the natural world (laws of nature) and the sciences (thermodynamic laws), to speak of authoritative positions (to lay down the law, his opinion is law), to describe a body of rules (Murphy's law) or the rules that govern any sort of ritual event (the laws of the game). The meaning of the term *law* is much more circumscribed in the legal world; it refers to state-driven decision-making operations and the rules that are used in those processes.

For our purposes, Burnouf and Hodgson made a most unfortunate choice. Calling an entire religious system, its philosophy, and its basic premises "law" creates, as one could imagine, immense confusion for the average legal reader about the nature of Buddhism, Buddhist teachings, and Buddhist Law. Frank Reynolds has stated that: "[b]ut 'Law' when it was used as a translation for Dharma, was used with cosmic, philosophical, and/or ethical connotations that were never associated—in any really intrinsic or crucial way—

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20. See French & Nathan, *supra* note 4, at 4.

21. See generally *id.*

with legal systems or codes.”<sup>22</sup> Even today, entering the words “Buddhist Law” into any web search engine brings up sites on Buddhist religion and philosophy totally unrelated to our topic.<sup>23</sup>

Although the term Buddhist Law is used by practitioners and the general public to refer to all of the Buddha’s teachings and philosophy, for the purposes of this Article and in the academic discipline of Buddhist Studies, it refers to the rules of the monastic law code of the *Vinaya*, the first book of the Buddhist canon. Perhaps the foremost authority on this topic, Oscar Von Hinüber, has presented this comment by the Buddha followed by his own exegesis:

“Wait Sāriputta, wait! The [Buddha] will know the right time. The teacher will not prescribe any rule<sup>24</sup>. . . to his Pupils, he will not recite the [list of the rules]<sup>25</sup> as long as no factors leading to defilement . . . appear in the order (Vin.III.9).”

This is the answer of the Buddha to Sāriputta’s worries that harm may be done to the order, if no rules of conduct are prescribed in time. And Sāriputta further points out that some of the buddhas of the past neglected this very duty with disastrous results: [t]heir teaching suffered a quick decay and an early disappearance.

This passage underlines three important points: first, the significance of Buddhist ecclesiastical law. For without *vinaya* there is no order ([P:] *saṃgha*) and without the community of monks there is no Buddhism. Consequently the vinaya-texts are the last ones lost, when Buddhism eventually disappears. Secondly, the rules of conduct must be promulgated by the Buddha himself. He is the only law giver, and thus all rules, to which every single monk has to obey, are thought to go back to the Buddha. The third point is that the rules are prescribed only after an offence has been committed. Thus rules are derived from experience and based on the practical need to avoid certain forms of behavior in [the] future.

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22. Frank Reynolds, *Buddhism and Law—Preface*, 18 J. INT’L ASS’N BUDDHIST STUDIES 1, 3 (1995).

23. *E.g.*, Google Search of Buddhist Law, GOOGLE, <https://www.google.com/search?q=buddhist+law&oq=buddhist+law> (last visited Apr. 10, 2015) (listing what comes up with Google search).

24. The term used here is *sikkhāpadaṃ paññāpeti*. Oskar Von Hinüber, *Buddhist Law According to the Theravada-Vinaya: A Survey of Theory and Practice*, 18 J. INT’L ASS’N BUDDHIST STUDIES 7, 7 (1995).

25. The list of all the rules is here called the *Pātimokha*. *Id.*

This means at the same time that the cause for a rule is always due to the wrong behavior of a certain person . . . .<sup>26</sup>

In this Article, the term “Buddhist Law” refers not to the entire teaching of the Buddha but to the actual rules for social control that he is said to have developed. The term Buddhism and Law has been used as a differentiating term to indicate the ways in which Buddhism affected, was affected by, and interacted with secular legal systems.

#### D. *What then is “law”?*

As mentioned above, the definition of religious law that is based on the operation of the Holy Roman Empire of Europe, the procedures of the Islamic Shari’a, or the practices in the Jewish Torah, is not going to be very conducive to the study of Buddhist Law. This is a genuine problem and one that should be addressed at the start of this inquiry. The term “law” has come to mean something very particular in modern English, namely, “the written secular laws of a nation-state, that is, the statutes, cases, rulebooks, law codes, judicial processes, and decision documents of a political entity.”<sup>27</sup> So too has the term “religious law” taken on this coloration of judicial processes, rules, and sanctions.

This definition excludes many of the cultural aspects of law and social sanctions that are used by people to maintain social control often without the use of institutionalized nation-state power. It excludes the very important processes and forms of socialization and social control that happen in social groups such as etiquette, social sanctions, social customs, ranking privileges, internalized rule-following, local negotiation, bullying, mediation, refusing to sue, leaving, ostracism, manners regulating speech, interaction, silence, and other general behaviors. While Buddhist Law includes cases, rules, judicial procedures, decisions, and sanctions, its primary intent is to present a system of socialization and internalization for the individual in the *saṅgha* community so that she or he can be a practitioner of Buddhism.

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26. *Id.* Oskar Von Hinüber’s translation of the Pali has been adapted for this Article. Von Hinüber goes on to cite the passage on the very first offender, the monk Upasena.

27. French & Nathan, *supra* note 4, at 13.



Therefore, if our definition of law is expanded to include many of these other processes used to regulate behavior, the possibility of studying legal systems such as Buddhist Law, which is based in both external and internal socialization, opens up.

A further issue is that Buddhist Law has been considered other-worldly and spiritual, not concerned with mundane daily issues, a religion that stayed out of the political and legal forums of the state. As Frank Reynolds has stated, the prevailing view was that "*true Buddhism* was not a religion that had a strong legal component[,]”<sup>28</sup> because it was “concerned with individuals but not with issues of social, political, and economic order . . . .”<sup>29</sup> He continues:

Buddhist secular law was given even less attention than the study of monastic law. The Buddhological [scholarly] community as such was hardly aware either of the presence of Buddhist secular law or the influence Buddhism had had on the legal systems in the countries where the *sāsana* (S: *śāsana*) had been established.<sup>30</sup>

Additionally, social scientists and comparative lawyers have failed to investigate the influence of Buddhism and Buddhist Law, because they have long been influenced by the views of famous German sociologist, Max Weber, the touchstone for interpretation of Buddhism.<sup>31</sup> As David Gellner has pointed out, what Weber “wanted to know was whether, at any point in their history, non-European civilizational traditions had within them the religious and cultural resources to give rise to a capitalist spirit as had happened with forms of Protestantism in Europe and North America.”<sup>32</sup> These resources or qualities were defined the *active*, *rational*, *this-worldly*, and *ascetic* approach. Weber stated that “Buddhism

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28. Reynolds, *supra* note 22, at 3.

29. *Id.*

30. *Sāsana* (S: *śāsana*) means the teachings of the Buddha. *Id.* at 3-4.

31. See generally MAX WEBER, *THE RELIGION OF INDIA: THE SOCIOLOGY OF HINDUISM AND BUDDHISM* (Han H. Gerth & Don Martindale eds. & trans., The Free Press 1962) (1915) (Max Weber lived from 1864–1920).

32. David Gellner, *The Uses of Max Weber: Legitimation and Amnesia in Buddhology, South Asian History and Anthropological Practice Theory*, in *THE OXFORD HANDBOOK OF SOCIOLOGY OF RELIGION* 48, 49 (Peter Clarke ed., 2011).

was rational, but not very ascetic; . . . it did not encourage an active, thisworldly orientation on the part of its most dedicated followers.”<sup>33</sup> From this reading of Weber, the primary message to comparative lawyers and scholars was that Buddhism was an *other-worldly* religion, concerned with the mystical and contemplative, and not actively engaged in mundane politics and law. This message has had a continuing influence that has undermined the study of Buddhism and law. Patrick Glenn, a pre-eminent legal comparativist has stated as recently as 2010 that Buddhism spread:

in a non-political, non-institutional way, just telling people about the way of the world and achieving some kind of political consensus only in Tibet. Generally, it was only within the communities of buddhist monks or *sangha* that some type of formal order developed, leaving external societies free to drift or even to enact positive (though necessarily unreal) law.<sup>34</sup>

One final issue in the definition of law is the recent work in the academy on legal orientalism. Following Edward Said’s lead, Teemu Ruskola and Piyel Haldar have presented the idea that non-Asian scholars prioritize their superior knowledge of texts, languages, and cultures of Asia based on their own hermeneutical presumptions.<sup>35</sup> Ruskola thinks that this framework allows scholars to decide which cultures have law and which don’t, how much law they have, and how they should be viewed.<sup>36</sup> It also creates a license for non-Asian scholars and others to dictate to Asians about the best forms of law and decision-making.<sup>37</sup> With an orientalist definition of law, the superior party determines which legal systems are of value and which are not, and perhaps even with the best

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33. *Id.* at 52.

34. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 331-32 (4th ed. 2010) (footnotes omitted). Note that his categorizations of legal types are a change from those of René David and John E.C. Brierley or Zweigert and Kötz.

35. See PIYEL HALDAR, *LAW, ORIENTALISM AND POSTCOLONIALISM: THE JURISDICTION OF THE LOTUS EATERS* 13-15 (2007); TEEMU RUSKOLA, *LEGAL ORIENTALISM: CHINA, THE UNITED STATES, AND MODERN LAW* 3-5 (2013).

36. RUSKOLA, *supra* note 35, at 5.

37. *See id.*

of intentions, which are “*other-worldly*” and therefore not legal.<sup>38</sup> This faulty approach to the legal and religious legal systems of Asia is yet another reason why we need to learn more about Buddhist Law.

## II. PART TWO

*If a monk [instigator] enjoins a [second] monk, saying: “Steal such and such goods,” [this] is an offence of wrong-doing. If [the second monk], thinking these (are goods to be stolen), steals them, there is an offence involving defeat<sup>39</sup> for both.*

*If a monk [instigator] enjoins a [second] monk, saying: “Steal such and such goods,” and [the second monk] thinking these (are the goods to be stolen), steals something else, there is no offense for the instigator, [but] there is an offense involving defeat for the thief.*

*If a monk [instigator] enjoins a second monk saying: “Steal such and such goods” and, the second monk], thinking something else (are the goods to be stolen), steals them, there is an offense involving defeat for both.*

*If a monk [instigator] enjoins a second monk saying: “Steal such and such goods” and the second monk] thinking something else (are the goods to be stolen), steals something else, there is no offense for the instigator; [but] there is an offense involving defeat for the thief.*

*If a monk [instigator] enjoins a [second] monk, saying: “Tell of such and such (matter), let so and so tell of such and such, let so and so steal such and such goods,” there is an offence of wrong-doing. . . . If he [speaks to] another there is an offence of wrong-doing. If the thief agrees, there is a [grave] offence for the instigator. If he steals these goods, there is an offence involving defeat for [all four people].*

—*A Section from the Buddhist Law Code, Vinaya, Against the Taking of What was not Given*<sup>40</sup>

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38. *Id.* at 5-7.

39. As mentioned above, “Defeat” is the term used in English here to describe expulsion or ostracism from the community of monks or nuns, which is the most serious sanction that can be administered. See 1 THE BOOK OF THE DISCIPLINE, *supra* note 2, at 190-91.

40. Adapted from 1 THE BOOK OF THE DISCIPLINE, *supra* note 2, at 88-93. Exegesis: In the short excerpt above, the subtle distinctions between the intentions and actions of an instigator and an accomplice are reviewed as well as the different levels of sanctions. If a monk instigator, A, convinces a second party,

This Part on the *Vinayas* is presented here as only a very initial introduction to the framework and ideas in these texts. Later Articles will deal in much greater depth with these law codes and their content. It is important to point out here that the Buddhist Law Code, the *Vinaya*, represents one third of the three-part Buddhist Canon called the Three Baskets, or *Tripitaka* (P: *Tipiṭaka*), a massive document, several hundred times as long as the Hebrew or Christian Bible or the Qu'ran.<sup>41</sup> Part Two will try to detail how many *Vinayas* there were and are, what kinds there are, and what their dates are. It is also important to understand what types of information are contained in these texts and how they are organized. A final Section interrogates their style and why they were written at all.

A. *How many Vinayas are there, What kinds are there, and What are their Dates?*

According to tradition, after enlightenment under a *pipal* tree in approximately the sixth century BCE, the Buddha

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B, to steal what A intended to have stolen, and B steals it, they will both be defeated. If B knowingly takes something different, A has probably only committed a wrong-doing, although the thief B is defeated; whereas if B takes something different thinking he is following A's orders, they are both defeated. The important nexus here is between the intent of the instigator and the intent and then action of the accomplice. If the accomplice follows, or thinks that he is following A's instructions, defeat is inevitable.

The last section, involving four people, gives the levels of possible sanctions—no offense, wrong-doing, grave offense, and defeat. When a monk instigator A convinces a second monk B to steal, monk A has committed a wrong doing. If monk B tells monk C, that is an offense of wrong-doing. If monk C tells monk D and he agrees, it is a grave offense for monk A. If monk D then steals the goods monk A intended to be stolen, all four people, monks A, B, C, and D, will be defeated.

What matters here is the match up of the intent with the plan and then the resulting action. This passage also demonstrates the degree to which having the motivation or intent to do the act and then the completion of the suggested act changes the sanction. See Kieffer-Pülz, *supra* note 17, at 54 (distinguishing intent and negligence in the *Vinaya*).

41. See Rupert Gethin, *Keeping the Buddha's Rules: The View from the Sutra Pitaka*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 63, 63 (defining the three baskets).

began teaching and deciding cases that were later compiled into the *Vinaya*.<sup>42</sup> There are several points that can be made about the number and types of *Vinayas*.

First, while there is controversy among a select group of scholars about the dating of the texts attributed to the Buddha, there are some things that have been tentatively settled. People agree that tradition says the entire *Vinaya* was first recited by the monk Upāli at the First Council right after the Buddha's death. Also, we know that several different *Vinayas* were composed by various splinter groups within the early Buddhist community. Scholars have determined that the community split into two groups, probably a hundred years after the death of the Buddha, at the Second Buddhist Council, over issues concerning the *Vinaya*. The two resulting entities were The Great Order of Monks,<sup>43</sup> a group that eventually became the precursors of the Mahayana Buddhist tradition currently dominant in East Asia; and the Sect of Elders,<sup>44</sup> that then split into other groups, one of which eventually became the well-known *Theravādan* group of South and Southeast Asia.<sup>45</sup> Some of the other schools that developed from these further splits wrote their own *Vinayas*, for use within their communities. As Petra Kieffer-Pülz has stated, there are three *Vinayas* currently in use: the Chinese language *Vinaya* that is primarily used in East Asia, the Pāli language *Vinaya*, primarily used in South and Southeast Asia, and the Tibetan *Vinaya* that is used in Tibet, Bhutan, Mongolia, and some parts of the Himalayas and Central Asia.<sup>46</sup> Scholars who are

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42. See French & Nathan, *supra* note 4, at 2-10.

43. The *Mahāsāṃghikas* (Great Order of Monks).

44. *Sthaviravādins*, or *Sthaviranikāya* (Sect of the Elders).

45. See Kieffer-Pülz, *supra* note 17, at 46-47.

46. Kieffer-Pülz, *supra* note 17, at 48.

Although only three *Vinayas* are followed today, those of the defunct schools have been handed down complete and in fragments in different languages: Sanskrit, Pāli, Gāndhārī, and Tocharian, as well as Chinese and Tibetan translations. Six seemingly complete *Vinayas* belonging to the *Dharmaguptakas*, *Mahāsāṃghikas*, *Mahīśāsakas*, *Mūlasarvāstivādins*, *Sarvāstivādins*, and *Theravādins* are extant. Additionally, we have fragments of the *Haimavatas* (ascription contested), *Kāśyapīyas*, *Mahāsāṃghikas-Lokottaravādins*, *Sammitīyas*,

studying the ancient texts argue sensibly that as many as possible of these early texts should be consulted to help create a fuller picture of what was originally meant by the Buddha.<sup>47</sup> Practitioners such as Buddhist monks and nuns, who are reciting parts of the *Vinaya* twice every month, generally use their own version in their local language.

Second, for at least two centuries, the *Vinaya* was memorized and presented orally.<sup>48</sup> Monk reciters, or *bhāṇaka*, learned a section of the text and then repeated it to the assembly throughout their career.<sup>49</sup> At the end of their life, they taught it to an aspiring student. Scholars have reasoned that constant recitation in front of hundreds of others cleared up mistakes, and the repetitions of words, phrases, and ideas in the text was an aid to the process of memorization. The italicized text sections included in this Article demonstrate this form of repetition.

Third, there is a tentative agreement on the dating of the various redactions of the body of the *Vinayas*. The Pāli language *Vinaya* of Sri Lanka and Southeast Asia, which is used in this Article, is thought to have closed in the first century BCE, the Chinese *Vinaya* of East Asia was closed upon its translation into Chinese six centuries later in the fifth century CE, and the Tibetan language *Vinaya* of Tibet,

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and of several other unidentified schools. Many of these schools are referred to in inscriptions, and in the reports of the Chinese pilgrims who visited India between the fifth and seventh centuries. The *Vinayas* still in use today include the *Dharmaguptika-vinaya* in East Asia, the *Mūlasarvāstivāda-vinaya* in Tibet and Mongolia (and it seems in some circles in Japan), and the *Theravāda-vinaya* in Sri Lanka, Burma, Thailand, and other countries.

*Id.*

47. Gregory Schopen and his students are leaders in this work. See generally SHAYNE CLARKE, FAMILY MATTERS IN INDIAN BUDDHIST MONASTICISMS (2014); GREGORY SCHOPEN, BONES, STONES, AND BUDDHIST MONKS: COLLECTED PAPERS ON THE ARCHAEOLOGY, EPIGRAPHY, AND TEXTS OF MONASTIC BUDDHISM IN INDIA (1997); GREGORY SCHOPEN, BUDDHIST MONKS AND BUSINESS MATTERS: STILL MORE PAPERS ON MONASTIC BUDDHISM IN INDIA (2004); GREGORY SCHOPEN, BUDDHIST NUNS, MONKS, AND OTHER WORLDLY MATTERS (2014); GREGORY SCHOPEN, FIGMENTS AND FRAGMENTS OF MAHAYANA BUDDHISM IN INDIA: MORE COLLECTED PAPERS (2005).

48. See Kieffer-Pülz, *supra* note 17, at 47.

49. *Id.* at 47 & n.10.

Bhutan, and Mongolia closed when translated into Tibetan in the ninth century CE.<sup>50</sup>

Fourth, there is also little doubt that all of the various versions of the *Vinaya* "share a common core."<sup>51</sup> For the purposes of this Article, we have been using the Pāli language *Theravāda Vinaya* translated by I.B. Horner to explain legal ideas and reasoning in Buddhist Law. This is being done with the important scholarly caveat, as stated by the *Vinaya* scholar Petra Kieffer-Pülz, that there is "not just one *Vinaya*, but several, and they stem from distinct schools, from different time periods, from different regions, and were adapted to their environments to different degrees."<sup>52</sup> That there is variation even inside a single *Vinaya* must be taken into account as well.<sup>53</sup> Also, "[a]s a corrective, information obtained from the texts has to be checked against external sources (archeological, epigraphical, and numismatical). General statements on the basis of only one *Vinaya* should belong to the past."<sup>54</sup> So, with these caveats fully in mind, we will be using this version of the *Vinaya* as one representative example.

### B. *How is this Vinaya organized?*

The *Vinaya* is organized into two major Parts with several subdivisions and a final appendix.<sup>55</sup> The First Part consists of a core list of conduct rules<sup>56</sup> for monks and nuns to follow after full ordination. Monks have between 219 and 262 rules to follow depending on the school of Buddhism, and nuns have to follow between 277 and 371.<sup>57</sup> The Second Part is a set of legal procedures for the monastic organizations to

50. *Id.* at 50-51.

51. See Kieffer-Pülz, *supra* note 17, at 47.

52. *Id.* at 61.

53. See *id.* (discussing variation within one particular *Vinaya*).

54. *Id.* at 61-62.

55. *Id.* at 50 (The Parivāra is an appendix or digest of the *Vinaya*).

56. *Id.* at 48-49 & n.14 (This section is called the *Suttavibhaṅga* and it contains the *Prātimokṣa* (P: *Patimokkha*) or the collection of the rules).

57. See *id.* at 49.

use when making community legal decisions.<sup>58</sup> We will be using the *Pāli Theravāda Vinaya* as an example, which has 227 major rules for monks and 311 for nuns. The rules and divisions outlined here are not meant as the authentic list but as one statement derived from this *Pāli Vinaya*.<sup>59</sup> The Appendix, which will not be covered in depth below, is a summary of the contents of the first two Parts in nineteen chapters, and many think that it is a later addition to the work.<sup>60</sup>

The First Part, the core list of rules for a monk, is divided into seven sections for monks, with the first section of rules listing the most serious offenses and the last section, the least serious.<sup>61</sup> The *first section* of the First Part is made up of four rules that comprise the list of expulsion offenses, or the rules for which a monk or nun will be irrevocably expelled from the community.<sup>62</sup> The two passages presented above in italics on “sexual intercourse” and “taking of what was not given,” are rules resulting in expulsion, the most serious of offenses. The other two are: depriving another of life, or murder, and falsely claiming a state of attainment. This last one was considered an unusual offence at the time, to claim a state of spiritual attainment that had not been achieved; for Buddhists, it constituted a lie that was so heinous that it resulted in permanent expulsion. So these four offences comprise the *first section* of the Rules.

The thirteen transgressions in the *second section* resulted in a full investigation, a meeting of the community of Buddhists, possible probation, and/or a temporary

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58. This section is called *Skandhaka* and also the *Vinayavastu*. See French & Nathan, *supra* note 4, at 48-50 & n.16. The *Pāli Vinaya* is thought to have twenty-two sections while the Sanskrit *Vinaya* has twenty.

59. The list of rules in the *Prātimokṣa* vary in number depending on the scholar, context, use, dating, and the particular *Vinaya*. This listing is taken primarily from Von Hinüber, *supra* note 24, 7-45.

60. The Appendix section is called the *Parivāra*. See Kieffer-Pülz, *supra* note 17, at 50.

61. *Id.* at 49.

62. As noted above, these are called *Pārājika*, which means “relating to expulsion,” (defeat). See *id.* at 49.



expulsion from the community.<sup>63</sup> Typical of these *second section* offences are rules about discharge of semen, conduct with the other sex, building of huts and monasteries, defamation of other monastics, causing a schism or splitting the order, refusing to approach the teachings with respect, rejecting criticism, and bringing families into disrepute. The *third section* has only two rules and they concern a monk being in an enclosed place in private with a woman, an offense that only requires as evidence the accusation of a credible laywoman.<sup>64</sup>

The *fourth section* details 122 rules that result in a confession, forfeiture of the item, or discontinuation of the practice. The first thirty rules discuss the property of a monk.<sup>65</sup> Examples in this section concern: keeping too many robes; making another wash your robes; accepting too many robes from the laity; trying to obtain nicer robes, blankets, alms bowls, or rugs; accepting or possessing gold or money; and buying, trading, and selling goods. The discussion of

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63. See Kieffer-Pülz, *supra* note 17, at 49 & n.22 (describing the *saṅghādisesa* offenses).

64. These two are called the *Aniyata* (undetermined) offenses. Von Hinüber has this to say about these offenses:

It is legally interesting that the monk is considered guilty, if a trustworthy laywoman (*saddheyyavacasā upāsikā*) who is the very woman involved accuses him. Following the *Pātimokkha*, no further evidence is needed. The early commentary, however, the *Suttavibhaṅga* adds (and thus at the same time mitigates the rule) that it is necessary, too, that the monk does not deny having committed the respective offense.

Von Hinüber, *supra* note 24, at 10-11. With respect to the confession by the monk and the concept of truth, he goes on to state:

Here we find one of the basic principles of early Buddhist Law as laid down in the *Pātimokkha*: that the monk involved has to admit his intention to commit the offense. Consequently the moral standards of the monks are supposed to be very high. Speaking the truth is taken more or less for granted here as in Brahmanical tradition, where it is thought that brahmins speak the truth by their very nature. Given the high esteem for truth necessarily found in oral cultures such as early Buddhism or that the Veda, it is surprising that telling a lie is considered only as a *Pācittiya* offense.

*Id.* at 11.

65. These are called the *Nissaggiya pācittiya* (forfeiture/expiation) offenses.

possessing money is particularly interesting because it is well known that monks and nuns often had extensive wealth and commissioned the building of monasteries and other buildings.<sup>66</sup> The second half of the *fourth section*<sup>67</sup> contains ninety-two rules that result in reparations of some kind, often confession, including rules against deliberately lying, criticizing, complaining, showing disrespect, insulting or telling malicious tales about other monks, damaging a living plant, not putting away bedding, taking too much food, staying in an army encampment, tickling with the fingers, hitting or striking another monk, hurting an animal, and many other socially inappropriate acts. The *fifth of the sections* is sanctioned by confession and provides four rules about correctly accepting and eating food.<sup>68</sup>

The *sixth section* gives seventy-five rules of training concerning the behavior, bearing, and posture of a monk.<sup>69</sup> These seventy-five rules concern more minor aspects of conduct and deportment that includes bodily behavior<sup>70</sup> such as wearing robes properly, covering oneself when sitting, controlling one's gaze, not speaking or laughing loudly, not swinging one's arms or swaying the body, and not clasping the knees. It also delineates how a monk must act with respect to the food that he is offered<sup>71</sup> and how he must eat, for example, without putting his fingers in his mouth or putting his tongue out. Next, this section continues with rules about to whom a monk may and may not teach the

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66. See SCHOPEN, BONES, STONES, & BUDDHIST MONKS, *supra* note 47, at 3-4; SCHOPEN, BUDDHIST MONKS AND BUSINESS MATTERS, *supra* note 47, at 11-14, 32-33.

67. These are called the *Suddha pācittiya* (expiation). Von Hinüber, *supra* note 24, at 11. Some authors divide this fourth section in half and call these two different sections: the fourth is the *Nissaggiya pācittiya* and the fifth is the *Pācittiya*. See, e.g., JOHN C. HOLT, DISCIPLINE: THE CANONICAL BUDDHISM OF THE VINAYAPITAKA 35 (1981).

68. *Pāṭidesanīya* (confession) offenses. See 3 THE BOOK OF THE DISCIPLINE, *supra* note 2, at 103-19; Von Hinüber, *supra* note 24, at 14.

69. These are called the *Sekhiyavatta* (training) offenses.

70. *Sāruppa* offenses.

71. *Bhojanapaṭisaṃyuttā* offenses.

dharma.<sup>72</sup> For example, he may not teach to someone in a high seat when he has a low seat, or while clasping his knees, or to someone walking in front of him. Finally, there are miscellaneous rules about how and where to urinate and defecate, for example, not while standing, not into green vegetation or into the water.

The *final section* concerns legal processes for conflicts between and among monks within the saṅgha community<sup>73</sup> such as who should be present when a decision is made, how to determine innocence and insanity, what is the correct level of unanimity, and how to frame the results. These ideas show up in both the First and the Second Part of the *Vinaya* and are called "the Seven Methods of Settling Disputes,"<sup>74</sup> namely: (1) appeal to scriptures and direct evidence of the offense; (2) statements by trustworthy witnesses and the memory of the defendant; (3) insanity as barring a trial and decision on the issue; (4) a voluntary confession by the defendant of the offense that may cause some mitigation; (5) without a confession of the offense, a discussion of self-contradictions and other testimony; (6) the vote of the assembly of monks and the verdict; or (7) in the case of a irresolvable conflict, both sides bow down to each other, offer apologies and accept possible responsibility.

The Procedures, or Second Part<sup>75</sup> of the *Pāli Theravāda Vinaya*, has two divisions divided into chapters with much more narrative about the Buddha and occurrences during his life. The first division discusses matters of entry into the saṅgha by ordination, timing for the twice-monthly recitation of the rules by the Buddhist community, the three-month rainy season retreat, the call for criticisms, administration of medicines, and disputes over making robes.<sup>76</sup> The second division of twelve chapters concerns procedures to deal with bad behavior, what to do when a monk on probation commits

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72. *Dhammadesanā paṭisaṃyutta* offenses.

73. *Adhikaraṇa-samatha* rules.

74. *Saptādhikaraṇa-samatha* rules.

75. *Skandhaka* or *Khandhaka* is the general name of the Second Part of the *Vinaya*. See Kieffer-Pülz, *supra* note 17, at 50 & n.20.

76. The first division is the *Mahāvagga* which has ten chapters.

another offence, the seven rules for settling disputes, stories of a monk who promoted schisms, suspending the recitation of the rules if a monk has refused to confess, and the inclusion of nuns.<sup>77</sup> This section ends with a final narrative on the origin of the *saṅgha* and what happened after the Buddha's death. The Appendix, with a full discussion of the basic rules for nuns, follows.<sup>78</sup>

### C. *Why was the Vinaya written and what is its style?*

The *Vinaya* is about correct behavior, not correct beliefs. This law code does not outline, at length, things that should and should not be *believed* by a person who is a Buddhist monk, nun, or layperson. It does not say that a Buddhist is a righteous person who believes in the *Vinaya* or that anyone who does not follow the *Vinaya* is heretical. Nor does it decry those that do not believe in the Buddha.

Instead, the *Vinaya* is a very detailed set of rules about the comportment, behavior, and presentation of monks and nuns both as individuals and as a community. As one scholar has noted: "The rules are thus best seen as tools to help transform the mind and behavior."<sup>79</sup> Because the original followers of Buddha existed in a society that had many different types of religious seekers and religious believers, the Buddha wanted his disciples to be very well behaved, to have perfect demeanor and comportment, as a symbol of his teachings. The *Vinaya* is about the intentions, actions, and behaviors of monks and nuns who have accepted the Buddhist path. It is a guide for the initiate, an aid in achieving the correct state of mindfulness; "discipline is meant to precede and support mental restraint, which leads to concentration and finally wisdom, rather [than] the converse."<sup>80</sup> Will Bodiford, a scholar of Japanese Buddhist

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77. The second division is the *Cūḷavagga* which has twelve chapters.

78. The Appendix section is called the *Parivāra*. See Kieffer-Pülz, *supra* note 17, at 50.

79. Peter Harvey, *Vinaya Principles for Assigning Degrees of Culpability*, 6 J. BUDDHIST ETHICS 271, 272 (1999).

80. Robert E. Buswell, Jr., 42 J. ASIAN STUD. 436, 437 (1983) (reviewing JOHN C. HOLT, *DISCIPLINE: THE CANONICAL BUDDHISM OF THE VINAYAPIṬAKA* (1981)).

Studies, has described the position of the *Vinaya* in the following way:

Because of the *vinaya*'s status as the founding charter for the entire Buddhist movement, it has played a far broader and deeper role in the doctrinal and social aspects of Buddhist religious life than suggested by the usual English-language translation "discipline. . . ." *Vinaya* texts are concerned with establishing not only rules for the disciplined behavior of members of the order, but also social practices that guide a well-organized religious order in the management of its affairs and property, in its interactions with the laity and secular powers, and—most of all—in defining its religious identity by linking the order historically to the Buddha, distinguishing the order from the laity, encouraging the laity to give to the order, and determining the proper procedures for going forth into the order; only by following such prescribed practices do members of the order become worthy recipients of the laity's charity.<sup>81</sup>

The style of the *Pāli Theravāda Vinaya* resembles that of many religious texts—filled with long exalted passages on the Buddha, narratives of his teachings, homilies, exegeses, casuistry, endless definitions of terms, repetitions of phrases, and other literary devices. It is similar to the Hebrew Bible as an anthology using many diverse genres and the Qur'an, which veers off into passages that do not pertain to the social rules being discussed. In contrast, the recent version of Roman Catholic Canon (1983), is much more succinct and law code-like in its presentation, though it includes passages on Norms and the Pastoral Council.

Karma Lekshe Tsomo has pointed out that there is a direct connection between Buddhist philosophical and ethical literature, and the forms of legal reasoning in the law code. She states:

Among the influential factors that affect the consequences of actions and were relevant to Buddhist legal reasoning are: the nature of the action, the intention behind the action, the agent of the action, the mindset of the agent, the object of the action, the *modus operandi*, and the factors or the circumstances surrounding

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81. William M. Bodiford, *Introduction* to GOING FORTH: VISIONS OF BUDDHIST VINAYA 2 (William M. Bodiford ed., 2005).

the event. These factors for legal reasoning are even encapsulated in some law codes in Buddhist countries.<sup>82</sup>

These aspects of reasoning are very apparent in the italicized passage on the theft of items by monks at the beginning of Part Two, above. In that passage, the intention behind the action in the instigator's mind was to steal a particular object. If the action was not taken by the instigator's agent, the level of criminal punishment for the instigator was reduced. Each of these factors has to be presented and weighed under the circumstances to determine the level of sanction: no offense, wrong-doing, grave offense, or defeat. When there is no completion of the original intention, there is little culpability.

Peter Harvey has written about culpability after stressing that the nature of the *Vinaya* as a text that "drastically limits the indulgence of desires and promotes a very self—controlled, calm way of life, of benefit to the monks and nuns themselves and an example which 'inspires confidence' among the laity."<sup>83</sup> In his discussion of culpability of a defendant under the law code, he goes into an extensive description of when, what, and how knowledge is needed for an offense, whether or not a mentally ill person or one who is unhinged, confused, distorted, afflicted with pain, frightened, "kneading their heart," or forgetful, can have actual knowledge.<sup>84</sup> With regard to intention, the *Vinaya* makes distinctions between unintentional, accidental, "not one's wish,"<sup>85</sup> unconscious acts of intention, and an action done to avoid a schism in the community. The detail in the rest of his article outlines the impact of doubt, error, partial error, partial ignorance, recklessness, carelessness, avoiding foreseeable harm in one's intention, having a compassionate motivation, and using an agent to accomplish your goal.<sup>86</sup> Also, if the defendant is overcome with honest remorse, guilt,

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82. Karma Lekshe Tsomo, *Karma, Monastic Law, and Gender Justice*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 334, 339.

83. Harvey, *supra* note 79, at 271.

84. *Id.* at 273.

85. *Id.*

86. *Id.* at 274-80.

or regret, he or she may be treated more lightly for the acknowledgement of the violation or transgression.<sup>87</sup> Thus the style of the *Vinaya*, while enormously varied from page to page, is capable of great detail when outlining legal factors for consideration in a case.<sup>88</sup>

### III. PART THREE

*Thus have I heard.*

*Once the Lord was staying at Rājagaha, at the Squirrels' Feeding Place in the Bamboo Grove. And at that time Sīgālaka the householder's son, having got up early and gone out of Rājagaha, was paying homage, with wet clothes and hair and with joined palms, to the different directions: to the east, the south, the west, the north, the nadir and the zenith.*

*And the Lord, having risen early and dressed, took his robe and bowl and went to Rājagaha for alms. And seeing Sīgālaka paying homage to the different directions, he said:*

*'Householder's son, why have you got up early to pay homage to the different directions?' . . . [and the Householder's son said]*

*'Well, Lord, how should one pay homage to the six directions . . . ?' . . . [And the Buddha responded] 'Then listen carefully, pay attention and I will speak.'*

*'Young householder, it is by abandoning the four defilements of action, by not doing the evil from the four causes, by not following the six ways of wasting one's substance – through avoiding these fourteen evil ways – that the [good disciple] covers the six directions, and by such practice becomes a conqueror of both worlds, so that all will go well with him in this world and the next. . . .*

*'What are the four defilements of action that are abandoned? Taking life is one, taking what is not given is one, sexual misconduct is one, lying speech is one. These are the four defilements of action that he abandons. . . .*

*'What are the four causes of evil from which he refrains? Evil action springs from attachment, it springs from ill-will, it springs from folly, it springs from fear. . . .*

*[And with respect to friends], the Teacher added:*

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87. *Id.* at 280.

88. *See generally id.* at 271-91.

*Some are drinking-mates, and some  
Profess their friendship to your face,  
But those who are your friends in need,  
They alone are friends indeed.*

*Sleeping late, adultery,  
Picking quarrels, doing harm,  
Evil friends and stinginess,  
These six things destroy a man.*

*He who goes with wicked friends  
And spends his time in wicked deeds,  
In this world and the next as well  
That man will come to suffer woe.*

*Dicing, wenching, drinking too,  
Dancing, singing, daylight sleep,  
Untimely prowling, evil friends  
And stinginess destroy a man.*

*He plays with dice and drinks strong drink  
And goes with others' well-loved wives,  
He takes the lower, baser course,  
And fades away like the waning moon.*

*The drunkard, broke and destitute,  
Ever thirsting as he drinks,  
Like stone in water sinks in debt,  
Soon bereft of all his kin.*

*He who spends his days in sleep,  
And makes the night his waking-time,  
Ever drunk and lecherous,  
Cannot keep a decent home.*

*"Too cold! Too hot! Too late!" they cry,  
Thus pushing all their work aside,  
Till every chance they might have had  
Of doing good has slipped away.*

*But he who reckons cold and heat  
As less than straws, and like a man  
Undertakes the task in hand,  
His joy will never grow the less.*



—A Section from the Sutta-Piṭaka, the second basket of the Buddhist Canon, from a book called the Dīgha Nikāya or The Long Discourses of the Buddha.<sup>89</sup>

Buddhism spread throughout Asia, down to Ceylon (Sri Lanka), out to Burma and Thailand, up through Gandhara in northern Pakistan and Afghanistan, out along the Silk Route to Central Asia, to China and into Tibet. At every juncture there are interesting tales of transmission and translation that become part of the lore, mythology, and history of the introduction of Buddhism into a particular area. The enormous importance of Buddhism in Central and East Asia at the time is conveyed in mythic, historical narratives such as the one below that shows the value of a translation of a Buddhist text in fourth century China.

One of the most famous translators of Sanskrit texts into Chinese was Kumārajīva (344-409/413 CE), a monk from the Central Asian state of Kucha, an oasis that sat along the northern stretch of the Taklamakan desert in what is now northwestern China. It was an important resting point on the Silk route and a very large center of Buddhist study, reported to have over 5000 monks. Tradition states that Kumārajīva was not only related to royalty, but also one of the most famous scholar-translators of his generation. This fact became known to a Chinese general, Lu Guang, who captured him and kept him as a hostage. Over the next eighteen years

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89. E.g., THE LONG DISCOURSES OF THE BUDDHA: A TRANSLATION OF THE DIGHA NIKĀYA 461-64 (Maurice Walshe trans., 1987). Exegesis: There is much material relevant to law in the rest of the Buddhist canon, a vast compendium of stories, philosophical explanations, detailed studies, lists, and many other genres. Unlike the *Vinaya* sections above, these passages in the *Sutta-Piṭaka* always start with "Thus have I heard," as they are meant to recount the act of listening to the Buddha and then reciting back what he said. The partial entry above is meant to provide social guidance to a young man about the best course in life and how he can tell good friends from bad. It has been termed, the *Sīgālaka Sutta*: *To Sīgālaka, Advice to Lay People* in several translations. A characteristic of the Buddha was the presentation of material in the manner that was most likely to be understood by the listener. Here, the layman presents the Buddha with a ritual to the four directions and thus the Buddha tailors his response in terms of that schema.

in confinement, Kumārajīva learned Chinese and began translating some of the Buddhist canon into that language. In 401 CE, an army finally defeated his captors and managed to bring him to Emperor Yaoxing, ruler of the Latter Qin, at the capital Chang'an, today known as Xi'an. There he was anointed a National Treasure and asked to create a translation bureau to continue his translations, many of which are still considered authoritative today. One of his important translations is the *Sarvāstivādin Vinaya*, or *Ten-Category Vinaya*, of sixty-one fascicles that was completed in 404–409 A.D.<sup>90</sup>

Part Three of this Article is an initial discussion of the many other related Buddhist legal texts that are available inside as well as outside of the Buddhist canon. As the religion moved throughout Asia, these texts influenced hundreds of secular political and legal institutions. Sections in this Part include a discussion of the variety of legal materials in the Buddhist canon outside of the *Vinaya* that contain legal proscriptions for kings as well as commoners, and models of political and legal power. Secular law texts in some of these countries copied and were influenced by Buddhist Law, and at other times, secular institutions strongly regulated Buddhist institutions. Historically, there was a much more fluid boundary between secular and Buddhist legal systems in many of the Asian states than commonly assumed. While the forms of Buddhism and Law remain very diverse, three different contextual patterns emerge rooted in geography and type of Buddhism, and each of these patterns is discussed below with examples.

#### A. *Does the Rest of the Buddhist Canon Contain Legal Materials?*

There is a great deal of legal source material contained in the rest of the vast *Tripaṭaka* (Pali: *Tipitaka*), called the three baskets of the Buddhist canon. The Pāli Theravada edition is divided into two other baskets after the *Vinaya*, namely, the Teachings or Discourses of the Buddha, *Sūtras*

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90. See Jan Nattier, *The Heart Sutra: A Chinese Apocryphal Text?*, 15 J. INT'L. ASS'N BUDDHIST STUD. 153 (1992); see also B.N. PURI, *BUDDHISM IN CENTRAL ASIA* (1987).

(P: *Suttas*) or *Sūtra-piṭaka*, and the Commentaries and Treatises, *Abhidharma* (P: *Abhidhamma*) or *Abhidharma-piṭaka*.<sup>91</sup> There are many other passages throughout these two other divisions of the *Tripaṭaka* that point to correct and incorrect actions; two will be discussed below. Also, there are hundreds more canonical and non-canonical texts in other parts of Asia attributed to the Buddha or a famous Buddhist teacher that inform us about legal concepts, rules, and ideas which will be discussed next.

According to most traditions, the Buddha expressed his attitudes on politics, laws, government institutions, leadership, social welfare, and many other subjects, and these ideas were recounted in a wide variety of texts, proverbs, stories, sayings, and homilies. It is important to remember that these statements were not commandments or injunctions presented with sanctions that should be applied if violated. But they were oftentimes taken as injunctions in Buddhist societies and by Buddhist leaders, such that following them made you a good ruler or person and disobeying them made you a bad one. Living in a society filled with people who were not following these prescriptions made it harder for you as a Buddhist to gain merit and reach enlightenment.

The passage cited above, the *Sigalovada Sutta* of the Long Discourses of the Buddha<sup>92</sup> beginning "Thus have I Heard," is one of the *sūtras* that gives the rules that pertain to lay persons, often referred to as *The Layperson's Code of Discipline*, or *Advice to Laypersons*. The *Sigalovada Sutta* is so named because it describes the encounter of a young man named Sigala with the Buddha in which he recounts several lists, such as the four defilements of action that we know from the *Vinaya*—namely taking life, stealing, sexual misconduct, and lying.<sup>93</sup> This is followed by the four causes of these evil actions—desire, hatred, ignorance, and fear—which is taken directly from the philosophical passages of Buddhist

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91. French & Nathan, *supra* note 4, at 8-9.

92. *Digha Nikaya*. See generally THE LONG DISCOURSES OF THE BUDDHA, *supra* note 89, at 461.

93. *Id.* at 461-62.

teachings.<sup>94</sup> After describing the six ways of ruining wealth (meant in every sense of the word)—drinking, wandering the streets at night, going to theatres, gambling, bad company, and laziness—the Buddha goes on to discuss what a good person should do, and how she or he should act towards their friends (partially excerpted above), wife, parents, teachers, workers, and ascetics.<sup>95</sup> For example, the good Buddhist layman should commit to be generous, kind with words, helpful, impartial, and full of integrity to his friend; the friend should respond back by being supportive, protecting wealth, providing shelter, being loyal, and honoring his family. This kind of reciprocal relation, providing a way to act as well as judge a relationship, is then set out for all of the other relationships—wife, parents, teachers, workers, and ascetics. Again, rather than presenting these as rules with sanctions or denouncing the actions of others, here the Buddha is presented as simply outlining what a good layperson should do to be a practitioner on the path of enlightenment he has set forth.

In several parts of the *Dīgha Nikāya*, the first of the five *sūtras* in the *Sutta-piṭaka*, the Buddha outlines the origin of the world and society, and how a good leader should rule. Scholars such as Steven Collins and Andrew Huxley have argued that these passages present a social contract theory of political order or a set of specific guidelines for “the behavior of kings that constitute a political philosophy.”<sup>96</sup> After citing several different *sūtras*, Rupert Gethin discusses the ten virtues of a good king (charity, moral restraint, generosity, honesty, gentleness, religious practice, good temper, mercy, patience, and cooperativeness) and then concludes:

[w]e should be cautious about reading a text . . . as preaching a Buddhist form of constitutional law and monarchy. Nevertheless, as Collins himself notes, the literary material found in the *Sūtra-piṭaka* provided resources that could be drawn on both to contest

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94. It is a basic Buddhist teaching that most evil actions are caused by the sets of mental conditions and emotions that drive those actions. See *id.* at 462.

95. *Id.* at 462, 467-68.

96. Rupert Gethin, *supra* note 41, at 63, 67, 69.

and justify military and political power, with the same text sometimes being used in both ways. At the very least, the tales of kings and . . . [wheel-turning Buddhist kings]<sup>97</sup> found in the texts of the *Sūtra Piṭaka* have been used by Buddhists to reflect on how a king should behave.<sup>98</sup>

Historically, there is little doubt that many kings and leaders who either were or became Buddhists tried to fulfill these ideals, often much to the chagrin of their advisors, and that many Buddhist leaders who chose not to incorporate these ideas into their leadership style were judged very harshly.

#### B. *What Kinds of Other Buddhist Legal Texts are There?*

While the *Vinaya* is the primary source for formal Buddhist Law, it was not used in some parts of the Buddhist world, it has been replaced in some, and quite different forms of it are employed in still others. But the basic ideas of this central legal text were often incorporated into both religious and secular legal documents. In some cases, the secular laws were directly influenced by, even copied from, Buddhist laws; in others the secular laws influenced interpretations of the *Vinaya*. At other venues, they were commingled into a wide variety of pluralistic legal systems, and in still others, the secular legal system was primarily used to regulate Buddhist institutions. Most of the serious academic writing in this area questions the idea of a fixed separation between monastic and lay law. It is the task of the next several decades of scholarly work to look critically at the enormous variety of texts that exist in the historical and current Buddhist Law world.

One example of legal texts that were drafted as Buddhism spread is local temple ordinances drawn up by the *saṅgha* of monasteries and nunneries for the operation of

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97. The term used here is *cakravartins* (P:*cakkavattin*). *Id.* at 73-74 (citations omitted).

98. *Id.* Gethin also states, "But the classic example of the implications of the first understandings of dharma for kings is the story of Temiya, a young prince (the Buddha-to-be) who feigns dumbness in order to avoid becoming king and having to act as judge and condemn criminals." *Id.* at 73.

their temple or institution.<sup>99</sup> In Tibet, these were called *bca'yig* and they existed in all but the smallest of monasteries or nunneries. In Sri Lanka, these internal temple ordinances were called *kriyākāra*; there were also legal regulations written not by the monasteries but by the secular government for the monasteries and nunneries. An example of this latter type of text<sup>100</sup> is discussed by Jonathan Walters, who has translated and described a “[twelfth century] act of monastic regulation recorded in stone by a powerful Sri Lankan Buddhist King . . . flanked on either side by colossal Buddha images exquisitely carved from a single rock outcropping fifty-six meters long.”<sup>101</sup> These proclamations were written by Sri Lanka Buddhist kings, and they detail actual monastic legal regulations, as well as sanctions for not following these regulations. The purpose of these stone-carved texts, still visible today, was for the secular government to impose legal rules on the monastics to keep them pure and following their own disciplinary rules.

Another area of textual development was commentaries, exegeses, and treatises on the *Vinaya*. Two of the most famous are commentaries on the Pāli *Vinaya*,<sup>102</sup> written by Buddhaghosa in the fifth century CE, that became dependable authoritative texts for secular judges and lawyers and were used for centuries throughout the Theravāda Buddhist world. The traditional account is that Buddhaghosa was a brahman born in Magadhi, India who studied the vedas and then converted to Buddhism after being bested in a debate. After travelling to Ceylon, he worked on Sinhalese commentaries, moved on to produce his own Buddhist commentaries, and became the preeminent

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99. See Benjamin Schonthal, *The Legal Regulation of Buddhism in Contemporary Sri Lanka*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 150, 151.

100. These were called *sāsana-katikāvata*. See Jonathan S. Walters, *Flanked by Images of Our Buddha: Community, Law, and Religion in a Premodern Buddhist Contest*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 135, 135-36.

101. *Id.*

102. The two Pali commentaries are the *Samantapāsādikā* and the *Kaṅkhāvitaraṇī* of Buddhaghosa. See O. VON HINUBER, *A HANDBOOK OF PALI LITERATURE* (2008).

Pāli expositor. Andrew Huxley has written extensively on the use by Burmese jurists<sup>103</sup> of both the *Vinaya* and the writings of Buddhaghosa to argue cases and craft secular legal rules such as the local law codes.<sup>104</sup> But there was also a great deal of interchange and variation in the historic Burmese legal courts. Christian Lammerts has stated that:

[a]s the examples above demonstrate, monastic law during the seventeenth century [in Burma] was anything but simply commensurate with the dicta of the Pāli *Vinaya*. Nor was the relative jurisdiction of *Vinaya*- or *dharmasattha*- derived law uniformly articulated by the various materials we have surveyed. Rather, there was a considerable amount of variation in ideas about the authoritative textual sources of monastic law and the separation of distinct lay and monastic jurisdictions.<sup>105</sup>

He goes on to give one example of a case of monastic inheritance law in which the parties relied on secular law and another case of secular inheritance in which a law from the *Vinaya* was used. He aptly calls this process "jurisdictional and textual intermingling."<sup>106</sup>

### C. *Basic Patterns of Buddhism and Law Throughout Asia*

Providing patterns of development throughout a large area over many hundreds of years is a task fraught with the dangerous likelihood of inaccuracies, serious errors, and overbroad generalizations. Recognizing this as a caveat, the following overly broad observations are presented. The range of types of relations between Buddhism and Law correlate, not surprisingly, with previous scholarly assessments of the types of Buddhism that developed in different areas of Asia. It is also important to remember that Buddhism was extremely diverse, and most areas had enclaves or mixtures

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103. Called *vinayadhara*. See French & Nathan, *supra* note 4, at 11.

104. The local law codes were called *dharmasat* (P: *dharmasattha*). *Id.* at 10-11.

105. Christian Lammerts, *Genres and Jurisdictions: Law Governing Monastic Inheritance in Seventeenth-Century Burma*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 183, 195.

106. *Id.* at 195.

with other types of Buddhism and with other religions as well.

### 1. Buddhist Law in South and Southeast Asia

Ceylon and Southeast Asia were the first sites of the transplantation of Buddhism from India into a foreign country. Scholars think that Theravādan Buddhism came to Ceylon (Sri Lanka) as early as the third century BCE when a monastery was established in the capital city of Anurādhapura and not long thereafter, a substantial part of the population had converted to the new religion. As a result, from this early point, “Sri Lankan jurisprudence had to accommodate Buddhist ideals as they exerted a powerful influence on the customs governing the relationships between the state and its subjects.”<sup>107</sup> Sunil Goonasekera has further indicated that “[f]rom this point, a strong identity developed between Buddhism, the Buddhist community, and the state of Sri Lanka, which compelled the head of the state to protect, maintain, and sustain Buddhism on the island.”<sup>108</sup>

While Sri Lanka adopted Pāli Buddhism directly from the mainland, the process of transmission to Southeast Asia happened with the aid of the Ceylonese Buddhist community. It came, however, according to the late Andrew Huxley, as part of the “Pāli-Buddhist package,” that is, cultural, social, administrative, textual, and religious aspects of Indian Buddhism were all adopted together. As he has described:

Three separate ethical and legal systems have coexisted in the area of Pāli Buddhist [Southeast Asian] society: Monks, kings, and laity were each bound by their respective legal codes, known as *Vinaya* . . . , *rajādhamma* . . . , and *dhammasat* . . . . The *rajadhamma* developed from the royal courts and monasteries of Ceylon in the early centuries CE. Southeast Asia contributed the *dhammasats* from the twelfth century onward. Each *dhammasat* is a collection of rules, many of them reflecting local Southeast Asian wisdom traditions. Each is adorned with lists, stories, technical terms and other odds and ends from the Pāli scriptures, commentaries, and manuals. The *dhammasats* also contain a few

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107. Sunil Goonasekera, *Buddhism and Law in Sri Lanka*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 118.

108. *Id.*



elements from Hindu law texts in the *Manusmṛti* tradition. . . . The idea of topical law reports is borrowed from the *Vinaya*. . . . By the sixteenth century, *dharmasat* and *rajasat* texts were being compiled from Laos in the north down to Malaysia in the south, and from Phnom Penh in the east to Akyab [far western Burma] in the west.<sup>109</sup>

As Huxley explained, political power in Southeast Asia was maintained through this balance between the king, the *saṅgha*, and the laity—a tripartite model of government. As a result, Buddhist texts and legal concepts played a foundational role in the development of the Southeast Asian state, both politically and legally.

The traditional Southeast Asian Buddhist model can be seen, in part, in the constitutional monarchy of Thailand that is currently 90% Buddhist with a constitutional monarchy strongly supportive of monks and monastic institutions, similar to the traditional Southeast Asian Buddhist model. Benjamin Schonthal, who has written about the Sri Lankan government's relationship to Buddhism, stated of Southeast Asia:

In certain places, Pāli sources insinuate the dominance of political authority by describing the rights of kings to periodically "cleanse" (*sodheti*) local monastic fraternities of impious or heterodox monks. In other places, Pāli texts suggest the superiority of religious authority by describing monks as assessing the virtues, beneficence, and legitimacy of kings.

. . .

In a way, these twin modes of religious governance may be seen as inflecting the legal regulation of Buddhism in modern nation-states with Theravādan Buddhist majorities. In modern-day Thailand, Laos, Cambodia, Myanmar/Burma, and Sri Lanka, laws pertaining to Buddhism consist of two types: One set of laws gives states powers to manage the conduct and wealth of Buddhist monks; another set of law obligates the state to protect the welfare of Buddhism generally.<sup>110</sup>

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109. Andrew Huxley, *Pāli Buddhist Law in Southeast Asia*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 167, 168.

110. Schonthal, *supra* note 99, at 151.

## 2. Buddhist Law in East Asia

After travelling up through Pakistan, Afghanistan, and Central Asia, Buddhism was imported into China from approximately the first century CE, and from there, into the rest of East Asia. While several different Buddhist *Vinayas* made the journey along the Silk Route,<sup>111</sup> the legal ideas encoded in the *Dharmaguptaka-Vinaya* have been arguably the most influential. It is important to remember however, that over time, as William Bodiford has pointed out, many other texts, especially apocryphal and visionary Mahāyāna texts, “present[ed] an approach to the precepts that differ[ed] from that found in the *vinaya*. . . . [These] Mahāyāna scriptures present universal precepts to be observed by all sentient beings, whether they are male or female, monastics or laypeople, humans or nonhumans (as long as they can understand human speech).”<sup>112</sup> Still in use today, the *Dharmaguptaka-Vinaya*, also called the *Four-Part Vinaya*, was first translated into Chinese in 405 CE by Buddhayaśas, another fascinating figure.

Born in Kashmir in what is now northwestern India, Buddhayaśas was renowned for his astonishing memory and his recitation of full Buddhist texts. One of his pupils was Kumārajīva, mentioned above, who invited him in 408 CE to come to the Chinese capital of Chang’an to help with translations. Buddhayaśas, in collaboration with a Chinese monk, is credited with the translation of the

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111. Other groups are thought to include the *Mahīśāsakas*, *Kāśyapīyas*, *Mahāsāṃghikas*, and *Sarvāstivādins*. See Kieffer-Pülz, *supra* note 17, at 48.

112. Bodiford, *Introduction*, *supra* note 81, at 4-5. As William Bodiford points out:

[I]n short succession the Chinese obtained translations of complete vinaya texts from several different Buddhist communities in India: the *Ten Recitation Vinaya* (of the Sarvāstivāda, trans. Ca. 404–409), the *Four Part Vinaya* (of the Dharmaguptaka, trans. Ca. 410–412), the *Mahāsāṃghika Vinaya* (trans. Ca. 416–418) and the *Five Part Vinaya* (of the Mahīśāsaka, trans. Ca. 422–423; Hirakawa 1970, 115–145).

*Id.* at 4.

*Dharmaguptaka-Vinaya*, the *Four-Part Vinaya*, as well as several other texts into Chinese.<sup>113</sup>

China presents an unusual case in the history of the transmission of Buddhism outside of India in that it had a written language, a law code, and a fully established tradition of political and legal institutions long before Buddhism began to enter the culture. The conclusion of many scholars, that Buddhism played no part in the development of secular law in China, is belied by the mass conversion of the population to Buddhism in the fourth century and thereafter, the constant interactions thereafter between monks, monastic institutions, and the administration of the various states throughout China for almost two thousand years. There are many hundreds of recorded state regulations throughout Chinese history concerning Buddhism<sup>114</sup> as well as many emperors and warlords who announced that they were Buddhist and enforcing Buddhist laws.

Korea and Japan received much of the Chinese Buddhist tradition between the fourth and the sixth century CE including missionary monks, the establishment of monasteries, introduction of textual sources, commentaries, schools of Buddhism, and monastic codes. The *Four-Part Vinaya* was initially adopted by monasteries in both Korea and Japan, retained historically by the Koreans, but eventually dropped by most Japanese Buddhists in favor of other forms of religious law, often locally created. In Japan,

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113. T. H. Barret has stated:

[T]his seems to have prompted both the undertaking of full *Vinaya* translations and also the nomination of monks to govern their own disciples as well as the Buddhist community as a whole. The former process resulted in the early fifth century in the production of no less than four written versions of the complete *Vinaya* in China at a time when it was still commonly orally transmitted in South Asia.

T.H. Barret, *Buddhism and Law in China: The Emergence of Distinctive Patterns in Chinese History*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 201, 206.

114. On this point, see generally Timothy Brook, *The Ownership and Theft of Monastic Land in Ming China*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 217, 217-33.

the very first law codes included references to Buddhist institutions, and the early courts counted the *Vinaya* as one of the six fields of learning.<sup>115</sup> William Bodiford has stated:

In a startling move, the Japanese monk Saichō (767-822) fought for and succeeded in establishing a separate Tendai school of Buddhism that rejected the vinaya and conducted ordinations based solely on the Mahāyāna discourse scriptures . . . .

. . .

It is difficult to exaggerate how much Saichō altered the course of Buddhism in Japan. By rejecting ordinations based on the vinaya in favor of rituals derived from Mahāyāna precept discourses alone, Saichō implicitly dismissed any distinction between the laity and the clergy insofar as the bodhisattva precepts themselves admitted no such distinction.<sup>116</sup>

### 3. Buddhist Law in North Asia and the Himalayan Region

The third broad division of the transmission of Buddhism is to the North Asian and Himalayan region of Tibet, Mongolia, and Bhutan where the Tibetan language *Mūlasarvāstivāda-vinaya* is still the law code for the monastic communities. Bhutan and Mongolia received the transmission of Buddhism primarily from the Tibetans who began the process of conversion by the eighth century CE. Tibetan history cites an early king sending scholars to Kashmir to create a syllabary and orthography for the Tibetan language. They brought back a written language but also many other organized, legitimating forms of knowledge such as texts and rituals from a universal religion, symbols, laws, reasoning, grammar, and administrative institutions that deeply affected Tibetan society.

By the thirteenth and fourteenth centuries, Tibet had a particular political formation called “patron-priest” which

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115. See Mark A. Nathan, *Buddhism and Law in Korean History: From Parallel Transmission to Institutional Divergence*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 255, 255-71; see also Brian Ruppert, *Buddhism and Law in Japan*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 273, 273-87.

116. Bodiford, *supra* note 81, at 10-11.

meant that external patrons, usually a strong Mongolian warlord (including Qubilai Khan), became the military force backing a priest, a Tibetan Buddhist leader from a particular sect. Riding through the countryside to the capital, these external armies often laid waste to the land of Tibet and then placed their religious leader on the throne. As French has stated:

The patron-priest relationship (T: *yon bdag mchod gnas*) became a central principle in Tibetan political ideology . . . producing a distinctive historical pattern. The basis of this diarchy derives from the practice of the Buddha who gathered his disciples into a monastic unit that needed to be supported by local leaders and a lay population of believers. . . . They were the "sun and the moon," with the Buddha as the personal embodiment of religion and the king as the personal embodiment of political power.<sup>117</sup>

Several law codes were drafted over a 100-year period of the seventeenth century that show influences from earlier Tibetan and Chinese law codes as well as Buddhism. In some, a long introductory encomium details the relationship between the "sun and the moon," a Tibetan monk as the Buddha-like priest and the Mongolian leader as the lay patron. The last law code written during this period, the Ganden Podrang Law Code, was still in operation over three hundred years later in the twentieth century and on the desks of the Tibetan High Court when the Chinese took the country over in 1959.<sup>118</sup>

Vesna Wallace has written of the relationship between Buddhist law codes and the political system of Mongolia that began during the second conversion of the Mongols in the late sixteenth century. Their dual law system, the law of dharma and the law of the state, is described in historical texts as derived from India, coming to Tibet, and then introduced by Qubilai Khan to Mongolia. The Mongolian law code texts during this early period also begin by paying extensive homage to the Buddha and the dharma.<sup>119</sup> As she points out,

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117. Rebecca Redwood French, *Buddhism and Law in Tibet*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 305, 310.

118. *Id.* at 311-18.

119. Vesna A. Wallace, *Buddhist Laws in Mongolia*, in *BUDDHISM AND LAW: AN INTRODUCTION*, *supra* note 4, at 319, 319.

the interdependence between the Buddhist monastic law codes and the state laws were most evident:

during the Bogd Khaan state when the attempt to make all members of society legally responsible for the conduct and moral condition of monks became a symbolic expression of the communal values of a Buddhist society. General disobedience of such law would result in disintegration of the Buddhist character of the Bogd Khaan's state. On these grounds, the observance of the law was deemed to be one's civil and religious duty.<sup>120</sup>

### CONCLUSION

This is the first in a series of Law Review Articles introducing Buddhist Law and its influence in Asia and the rest of the world, a new topic for academic legal literature in the United States. The use of two different types of writing in this Article, both italic translations of actual Buddhist legal materials and regular legal discussions and descriptions common to law reviews, is meant to help the non-Asian lawyer adjust to the style of the legal texts and some of the concepts and ideas that underlie Buddhism and Buddhist Law. The Articles that follow will provide more information on the types of *Vinayas* and their contents, examples from various contextual settings in Asia; the actual rules that were established in different areas; how they influenced social systems in Asia; what and how Buddhist Law fits into Anglo-American ideas of jurisprudence and philosophy; and other issues.

Buddhist Law developed in the fifth century before Christ in the Ganges River plain in the forests, jungles, and local villages of what is now northern India. The collection of casuistic stories and the resulting rules brought before the Buddha for decision became the *Vinaya*, the first section of the Buddhist canon, and they remain the rules enforced within the community of his disciples today. The *Vinaya* is a system of socialization and social control that includes rules on dress, deportment, etiquette, general behavior, manners, speech interactions, silence, as well as rules on theft, murder, lying, and sexual impropriety. As such, it is quite different from our current definition of law.

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120. *Id.*

While there are many different *Vinayas* as a result of the splinter groups that veered off in different directions in the early centuries, almost all versions of the Law Code created for Buddhist disciples that have come down to us retain basic similarities in form and content. This Article has employed a specific version of the *Vinaya*, the *Pāli Theravādan Vinaya*, and does not provide examples of the other types. There is also a great deal of other legal source material contained in the rest of the vast *Tripaṭaka* (Pali: *Tipitaka*), the Buddhist canon, and hundreds of other texts throughout Asia attributed to the Buddha and famous Buddhist teachers. These materials additionally inform us about legal concepts, rules, and ideas on a wide variety of topics in law and politics from leadership, to social welfare and taxes. Buddhist populations take this advice very seriously as it affects their own possibility for merit making and advancement to enlightenment. Three different geographical types of Buddhist Law are outlined to demonstrate the variety of historical and current forms.

The goal of this series of Articles is to begin to increase our understanding of the basic concepts in Buddhist Law to a level at least commensurate with our understanding of Christian law, Jewish law, Muslim law, and Hindu law. There are reasons that we might falter a bit in trying to understand it. Buddhist Law was devised as a set of rules and behaviors, both individual and collective, that reduce the possible instances of desire, ignorance, and anger that can cause immoral actions. While rather strictly requiring good comportment in every aspect of a person's life, it also emphasizes the basic Buddhist ideas of compassion, kindness, trustworthiness, and many other attributes that distinguish good individuals and citizens. Besides the intrinsic interest of a wholly unknown legal system, this material is useful for comparative lawyers, international lawyers, scholars of public policy, and anyone practicing law in a former or current Buddhist country. And there is so much more research needed, such as Buddhist Law on women and nuns, how crimes compare with other countries and other religious codes, what the key jurisprudential concepts are, how Buddhist philosophy and ethics figure into the law codes, and many others.

And these law codes and legal systems represent a completely different and very subversive model of government, not just a path to enlightenment, by requiring the socialization of individuals, the strong sanctioning of social inappropriateness, the recognition of the need for religion in tandem with, as opposed to separation from, politics, and a reorientation of the purpose of government. This set of rules for spiritual guidance, loaded with concrete legal norms, constitutes a profound attack on our current orthodoxy in law-and-religion scholarship and is presented here to provoke new conversations.



